BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TERESA A. ATER	)	
Claimant	)	
	)	
VS.	)	
	)	
ELLSWORTH CORRECTIONAL FACILITY	)	
Respondent	)	Docket No. 1,039,399
	)	
AND	)	
	)	
STATE SELF INSURANCE FUND	)	
Insurance Fund	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the October 9, 2009, Award entered by Administrative Law Judge Bruce E. Moore. The Board heard oral argument on January 20, 2010.

APPEARANCES

Scott J. Mann, of Hutchinson, Kansas, appeared for the claimant. Richard L. Friedeman, of Great Bend, Kansas, appeared for respondent and its insurance fund (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

This claim involves two alleged accidents. The first is alleged as a series beginning on November 7, 2007, and the second on February 18, 2008. The Administrative Law Judge (ALJ) denied claimant's application for workers compensation benefits as to both accident dates but for different reasons. Regarding claimant's alleged series of accidents beginning November 7, 2007, the ALJ found that claimant had satisfied her burden of proving that she suffered a personal injury by accident on November 7, 2007. The ALJ found, however, that claimant suffered a single accident and that claimant failed to give respondent timely notice of the work-related accident of November 7, 2007. Therefore, the ALJ did not reach the issue of whether claimant's injuries arose out of and in the course of her employment. In regard to claimant's claimed February 18, 2008, injury, the ALJ found the accidental injury occurred while in the course of her employment but claimant failed to sustain her burden of proof that the injury arose out of her employment.

Claimant requests review of the ALJ's findings that she failed to give respondent timely notice of her series of injuries beginning on November 7, 2007, and that her injury of February 18, 2008, did not arise out of her employment with respondent. If the Board reverses the ALJ on these issues, claimant requests the Board decide the following issues: Whether claimant's series of accidents beginning on November 7, 2007, arose out of and in the course of her employment with respondent; whether there was an underpayment of temporary total disability benefits; and the nature and extent of claimant's disability.

Respondent requests that the ALJ's Award be affirmed, arguing that claimant did not provide timely notice of her November 7, 2007, injury, that claimant did not have a series of accidents but one single accident on November 7, 2007, and that the alleged accident of February 18, 2008, was a natural and probable consequence of claimant's November 7, 2007, accident.

FINDINGS OF FACT

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact.

Claimant began working for respondent as a corrections officer on November 13, 2005. Her job was that of a responder, and when an emergency in the correctional facility was called, she was required to run to respond. The record is not clear on the amount of walking, running, standing or sitting the claimant's job duties included. On November 7, 2007, claimant was running and felt a pop in her left foot with subsequent sharp pain. She did not go to the doctor that day and did not report the incident to anyone. She continued to work at her same job. However, her foot progressively worsened and started to impede her ability to walk and work. On November 16, 2007, claimant went to the Russell

Regional Hospital Physicians Clinic, where she was seen by Melinda Wells, a nurse practitioner. The medical record indicates that claimant reported she felt something pop while she was running at work. Nurse Wells diagnosed claimant with tendonitis. Claimant testified that Nurse Wells wrapped her foot and told her to get crutches, put ice on her foot, and keep her foot elevated. The medical record, however, does not mention a recommendation that claimant get crutches.

Claimant testified that after her foot was wrapped and she was given crutches, she called respondent and spoke with someone in the human resources department. This call was made on November 16, the same day she was treated by Nurse Wells. Claimant believed she spoke with Annette Steward and may have spoken with Captain Daniel Ives. She also said she spoke with either Tina Davis[1] or Jina Murrell. Claimant testified she told Ms. Steward about the injury to her foot, what Nurse Wells told her to do, and that she was unable to return to work at that time. Claimant testified Ms. Steward told her that she had reported the injury too late and that respondent's policy was that injuries were to be reported within 24 hours. Claimant took that to mean it was too late for the injury to be covered by workers compensation insurance.

Claimant said her foot worsened. It swelled and became bruised, and she could not put any weight on it. On her own, she went to see Dr. Charles Joslin, who referred her to Dr. L. T. Fleske, an orthopedic surgeon. An MRI was done on her foot, after which Dr. Fleske diagnosed her with a stress fracture. Claimant was put in a cast immediately and was kept off her foot. Claimant treated with Dr. Fleske and was released from treatment with no restrictions on February 1, 2008. She testified that from November 16, 2007, until February 1, 2008, she did not work anywhere. For most of that time, she was on crutches or in a cast.

After her release from treatment by Dr. Fleske, claimant returned to her regular duties as a corrections officer. She testified that on February 18, 2008, she was walking down a sidewalk at work and her left foot snapped and popped again and severe pain shot through it. She immediately reported the injury to Captain Ives. Claimant tried to work after that accident, but her pain worsened. She went to see Dr. Fleske in late February 2008. He again put her in a cast and eventually performed surgery on April 16, 2008. Claimant continued to treat with Dr. Fleske, and he released her to return to work on August 14, 2008, with restrictions of no running. Running is one of the essential tasks in claimant's job, and she was terminated by respondent on August 18, 2008.

Claimant has been tested for rheumatoid arthritis by Dr. Joslin, but she said Dr. Joslin did not tell her whether she had arthritis. She knows that she has a bone-on-bone situation occurring in her hands. Claimant also said she had foot surgery in 1980 or 1981 performed by Dr. Reiff Brown. She indicated she had a splayfoot and said that a

[1] Tina Davis' last day at respondent was May 10, 2007.

bunion was cut off both sides of her foot. She said she had not had any problems with that foot after the surgery but admitted she told Dr. Fleske that she had a deformed toe ever since.

Captain Ives testified that he was claimant's supervisor on day shift. He testified that as a responder, if claimant got a call that there was an emergency, she would need to get to the area within four minutes, which could require her to run.

Captain Ives testified that respondent's policy is that if an employee reports an injury to a supervisor, no matter how slight, workers compensation paperwork is to be completed and an incident report is required by the end of the shift. He said that if claimant had called him on November 26, 2007, to report an accident that had occurred on November 7, 2007, he would not have told her she was out of time to file a workers compensation claim. He would have told her to fill out the paperwork. However, Captain Ives did not have any recollection of claimant telling him that she had been injured at work in November 2007. He knew claimant was off work from November 26, 2007, to about February 1, 2008, but his understanding was that she had an off-duty injury.

Captain Ives said there is a Captain's Log that would indicate if someone called in. The log would not indicate if an employee was going to be off work for a long period of time but would only indicate that a particular officer called in sick on a particular day. The Captain's Log for November 16, 2007, does not reflect that claimant called in. The log shows that on November 26, 2007, claimant did call in.

Jina Murrell is respondent's human resources manager. She verified that respondent's payroll records show that claimant worked her regular shifts through November 25, 2007, and was off work starting November 26, 2007.

Ms. Murrell testified that she never had a conversation with claimant about a work injury that occurred before February 2008. She testified that it would not have violated any policy if claimant had called in to report a work injury more than 24 hours after the injury had occurred. Once an accident is reported, respondent's procedure is to have the employee fill out the workers compensation paperwork. Respondent does have a policy that injuries are to be reported by the end of the employee's shift. But if someone does not do that, respondent will still have the injured employee fill out the paperwork. There is nothing in claimant's record to indicate that claimant claimed she injured her left foot or ankle at work before February 18, 2008.

Ms. Murrell testified that on November 26, 2007, someone brought a work release to respondent's facility advising that claimant was non-weight bearing on her left foot. Ms. Murrell did not speak with claimant about how she hurt her foot. All of the contact concerning the November 2007 injury, as far as Ms. Murrell knew, went through Annette Steward. The first time Ms. Murrell spoke with claimant about her foot problems was January 10, 2008, when claimant called and advised that her doctor had her off work

another two to three weeks. Ms. Murrell did not ask claimant at that time what had caused the problem with her foot or where the injury occurred. All of the information she has about claimant's problem is what she has gleaned from claimant's file. Respondent's records do not show that claimant told anyone at respondent that her November 2007 foot problems were work related.

Annette Steward is retired after working for respondent for 18 years. Her last position was as an administrative assistant with the human resources department. She identified claimant's time sheet for the pay period starting November 18, 2007, and ending December 1, 2007. The time sheet showed that claimant worked from November 18, 2007, through November 25, 2007, less days off during the Thanksgiving break. Claimant was off on sick leave starting November 26, 2007.

Ms. Steward testified concerning a log kept in the human resources department to track people's calls. The first note regarding this case was entered November 26, 2007. Ms. Steward testified that if claimant had called her on or about November 16, 2007, and said she was on crutches and not able to work, a note of that conversation would have been included on the log. But there was no note to that effect on that date in the log. The log shows claimant called Ms. Steward on November 26, 2007, and told her she had been put on crutches and would be off work per her doctor, and also that she would see an orthopedic specialist on November 28. Ms. Steward testified that claimant did not tell her at that time that her problem was work related.

Ms. Steward said that because she is only an administrative assistant, she would not have been able to make a decision about an employee not being able to file paperwork for workers compensation if the employee had not reported the accident within 24 hours. In the event that would have occurred, Ms. Steward would have told her supervisor, because her supervisor would have been the one to take up the issue of notice. Ms. Steward testified that she did not tell claimant it was too late to report a workers compensation injury, that she did not tell claimant that she had only 24 hours in which to do that, and that claimant never told her she had been injured at work in November 2007.

The next conversation Ms. Steward had with claimant after November 26 was on November 29, 2007, when claimant called with an update saying her foot was broken, she was having an MRI on the next Monday, and she would be off work for an extended amount of time. There is no indication that claimant said her foot problems occurred at work.

Claimant put on evidence from two co-workers. Devonna Jaske and Anita Schwerdtfeger both testified they were friends of claimant. Both knew of claimant's foot problems. Ms. Jaske could not remember if claimant said she hurt her foot at work. Ms. Schwerdtfeger knew claimant injured her foot at work but did not know if claimant was running in response to a call when she suffered the injury. Ms. Jaske could not remember if claimant said she had tried to report the foot problem to human resources but essentially

was told she was too late to file for workers compensation benefits. Ms. Schwerdtfeger said she and claimant had some discussion regarding workers compensation, but Ms. Schwerdtfeger could not remember what was said.

Terry Chaput is a unit team manager at respondent. In November 2007, he was a correctional counselor in Building 3, the same building in which claimant worked. He was claimant's evaluating supervisor. Mr. Chaput did not dispute that claimant was a responder and also said that when she got a call she would have had to run in response to get there as quickly as possible. He testified that he did not recall claimant ever telling him she had hurt herself at work. Had she done so, he would have told her to file an incident report. Mr. Chaput said that respondent's policy is that injuries be reported and paperwork completed during the shift the day an accident occurred. He does not recall that claimant told him she had been told by Ms. Steward that it was too late to file an accident report. Mr. Chaput remembers claimant telling him that respondent would not let her use workers compensation leave because she had not reported her condition as a workers compensation injury.

Anthony Robinson is a corrections specialist for respondent. In November 2007, he worked in Building 3. He confirmed that claimant was a responder during that period of time. He remembers talking with claimant about her having trouble with one of her feet but could not remember when that occurred. He does not recall discussing with claimant her medical condition, treatment, or alleged attempts to report the incident to human resources.

Dr. L. T. Fleske is a board-certified orthopedic surgeon. He first saw claimant in regard to this case on November 28, 2007, at the request of Dr. Joslin. Dr. Fleske obtained a history of claimant taking a step on November 7, 2007, and experiencing a sudden sharp pain over her left foot between the second and third toes. A CT scan showed claimant had a fracture. Dr. Fleske ordered an MRI, which confirmed claimant did have a stress fracture of the second metatarsal, and he then put her in a cast for three weeks. In January 2008, claimant was put on partial weight bearing and activity as tolerated. She was released from treatment on February 1, 2008, with no restrictions.

Dr. Fleske saw claimant approximately four weeks later on February 27, 2008. Claimant told him she was better for a while but then while she was walking at work while wearing special boots, she felt a pop and the pain came back. Dr. Fleske ordered a bone scan and saw claimant again on March 12, 2008. At that time, Dr. Fleske's diagnosis was that claimant had stress fractures in two locations on the same bone (the second metatarsal). Claimant's second stress fracture was new in the sense that it was not there at the time of her prior MRI, but Dr. Fleske said it was all still part of the same process. He performed surgery on April 16, 2008, where he fused the first toe at the level of the first metatarsophalangeal joint. The last time Dr. Fleske saw claimant was August 14, 2008, at which time he gave her a full release, but with a restriction of no running. He said that claimant could not run because she could not flex her toe.

Dr. Fleske said claimant had bunion surgery when she was young and had a great toe deformity that caused transfer of forces to the adjacent toe, and that was why she was getting stress fractures. Dr. Fleske testified that claimant's stepping on her foot on November 7, 2007, aggravated and made her stress fracture symptomatic. Dr. Fleske said that continuing to walk and wear boots at work would have continued to aggravate claimant's stress fracture condition. He opined that when claimant returned to work in February 2008, she was required to wear boots[2] and walk and that activity reaggravated the original stress fracture and created a second stress fracture. Dr. Fleske testified that claimant's reaggravation of her left foot condition in February 2008 was a natural and probable consequence of her foot injury of November 2007.

Based on the AMA *Guides*,[3] Dr. Fleske rated claimant as having a 13 percent permanent partial impairment to the left lower extremity at the level of the foot, which would be a 9 percent impairment to the lower extremity.

Dr. George G. Fluter, who is board certified in physical medicine and rehabilitation, examined claimant on September 17, 2008, at the request of claimant's attorney. Claimant described her injuries of November 2007 and February 2008, as well as recounted her treatment. She also told Dr. Fluter about an accident that had occurred a week earlier when she fell after having rolled her left ankle while walking on an uneven sidewalk. Claimant told him she was diagnosed with a sprained ankle and had some swelling and bruising as a result of that accident.

Claimant complained to Dr. Fluter that she was having pain affecting her neck/upper back, middle back, both wrists, right knee, both feet, right ankle, and both hands, which she described as a 7 on a 0 (no pain) to 10 (worst pain) scale. The pain had components of sharpness, aching and burning. She indicated to Dr. Fluter that she was confined to bed about once a week because of pain. Standing, walking and exercise made the pain worse. She indicated she had some numbness in her left great toe and some weakness in her left foot and ankle.

On examination, claimant had a limp on the left side. Muscle strength was functional. Resisted movements of the left foot caused pain. Claimant reported decreased sensation on the far end of the left great toe. Reflexes and pulses were normal. She had some swelling and bruising affecting the left foot and ankle and told Dr. Fluter she had a recent ankle sprain. She had tenderness to palpation along the length of her left great toe and along the left ankle. She had no evidence of looseness of the ankle joint. She had

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[2] There is no evidence in the record indicating the claimant was required by the respondent to wear special footwear to work.

[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

some reduction in ankle range of motion. Dr. Fluter diagnosed claimant with stress fractures at the area of the first metatarsophalangeal joint of the left foot.

Dr. Fluter opined that claimant's activity of running to respond to a call most likely contributed to the stress fracture of November 2007. Dr. Fluter also believes that claimant's work activity of walking on February 18, 2008, caused or aggravated her injury. He testified that given the circumstances, after claimant had non-operative treatment of her initial stress fracture and then the fracture recurred during a walking activity suggested that her original injury had not fully healed.

Using the AMA *Guides*, Dr. Fluter rated claimant as having a 7 percent permanent partial impairment of the lower extremity for mild ankle range of motion deficits and a 9 percent lower extremity impairment (13 percent impairment at the level of the foot) for ankylosis of the left great toe in a position of function. Combining the two ratings calculates to a total 15 percent permanent partial impairment to the left lower extremity.

Dr. Fluter opined that claimant's impairment for mild loss of range of motion in the ankle was related to both her recent fall and claimant's previous injury to her left great toe. He said claimant had some swelling in her ankle, which could affect the range of motion to some degree. Because claimant had the stress fractures and had to have a fusion that altered the movement of the great toe, Dr. Fluter indicated that claimant's 7 percent impairment for her mild ankle range of motion deficits was a direct and natural result of her November 7, 2007, injury. Dr. Fluter admitted, however, that he did not know what caused claimant's foot to roll under in her recent accident.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

There are two separate accidents alleged by the claimant, one a series beginning on November 7, 2007, and a second on February 18, 2008. ALJ Moore found and concluded the claimant failed to present credible evidence of timely notice of the November 7, 2007 accident. The ALJ also found and concluded that the claimant failed to sustain her burden of proof that the February 18, 2008 injury constitutes a "personal

injury" that "arose out of" her employment. The ALJ denied claimant's claim for workers compensation benefits for both injuries.

November 7, 2007

Claimant asserts the November 7, 2007 accident was an initial accident followed by a series of events. When an accident occurs as a result of a series of events K.S.A. 44-508(d) provides, in pertinent part:

> In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.[4]

The argument is not persuasive. Dr. Fleske diagnosed claimant as suffering from a chronic stress fracture due in part to the malformation of her foot and long hours in special boots on hard surfaces. Dr. Fleske's reference to boots claimant was required to wear at work suggests the boots contributed to the development of the stress fracture. Other than the comments claimant made to Dr. Fleske, there is no evidence of special footwear required by respondent in the record. The claimant has failed to prove she sustained a series of accidents. However, there is credible evidence that claimant sustained an accident on November 7, 2007.

Claimant alleges that her first injury occurred while running as a "responder" on November 7, 2007. The ALJ found and concluded the claimant satisfied her burden of proof that she suffered a personal injury, as defined by K.S.A. 44-508(e), on November 7, 2007. Further, he found and concluded claimant satisfied her burden of proof that she suffered a personal injury by accident, as defined by K.S.A. 44-508(d), on November 7, 2007.

K.S.A. 44-520 states:

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[4] K.S.A. 2007 Supp. 44-508(d).

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Claimant alleges she gave notice of her November 7, 2007 injury on November 16, 2007. Notice given on November 16, 2007 would have been within 10 days after the date of the alleged accident and would have satisfied the statutory requirement. Unfortunately, the greater weight of the evidence fails to support the claimant's assertions. There is no record of the November 16, 2007 telephone call claimant allegedly made. Further, claimant's own witnesses could not corroborate her report of accident/injury. The statute does allow that the period to provide notice may be extended to 75 days if just cause is shown. The claimant did not argue for this extension nor did the Board find any just cause to grant the extension. Even if just cause was present in this case, which it was not, that extension expired on January 21, 2008. It appears claimant's notice was not received until March 12, 2008, the date of claimant's demand letter to respondent.

Claimant has failed to present credible evidence that notice of the November 7, 2007 accident/injury was timely. The Board concludes the claimant did not provide timely notice of the November 7, 2007 accident/injury.

February 18, 2008

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[5] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[6]

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[5] K.S.A. 2007 Supp. 44-501(a).

[6] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[7]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[8] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[9] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[10]

Claimant immediately reported her February 18, 2008 accident/injury to a supervisor and appropriate documentation was completed. Thus, the notice requirements of K.S.A. 44-520 were satisfied.

The accident occurred at work while claimant was performing her regular duties so the accident/injury arose "in the course of" her employment.

The issue for the Board to decide is whether the February 18, 2008 accident/injury arose "out of" her employment.

As to that issue the Award states:

> Claimant's February 18, 2008 injuries arose while she was simply walking down a sidewalk. There is no evidence of any additional stress caused by running; nor is there any direct evidence of her footwear at the time of the 2nd fracture.

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[7] *Id.* at 278.

[8] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[9] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[10] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

> Even if the second stress fracture is the product of repetitive stresses over time, there is no direct evidence as to the hours Claimant was required to be on her feet, the nature of the footwear she was required, or chose, to wear. The evidence consists of Claimant's pre-existing congenital condition, coupled with the every-day activity of walking down a sidewalk.
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> In **Johnson v. Johnson County, 36 Kan.App.2d [786], 147 P.3d 1091[, *rev. denied* 281 Kan. 1378] (2006)**, the Kansas Court of Appeals held that "an injury is not compensable unless it is fairly traceable to the employment and comes from a hazard which the worker would not have been equally exposed to apart from the employment." **Syl. ¶ 1.**
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> Clearly, there is no hazard in walking that is peculiar to the Ellsworth Correctional Facility. Claimant has failed to sustain her burden of proof that the February 18, 2008 injury constitutes a "personal injury" that "arose out of" her employment.[11]

The Board has concluded that the exclusion of normal activities of day-to-day living from the definition of injury was an intent by the Legislature to codify and strengthen the holdings in *Martin*[12] and *Boeckmann.*[13] In *Martin*, the Court held the claimant's back injury did not arise out of his employment because "it is obvious that almost any everyday activity would have a tendency to aggravate his condition."[14] The same is true in the case at bar. Claimant had a preexisting condition that made her more susceptible to this injury. It was aggravated by walking. As in *Boeckmann*, this injury could have occurred anywhere. Claimant could have been walking at home, at the grocery store or any other normal everyday place and the injury could have occurred. The record fails to establish the degree to which her job required her to be on her feet and/or to walk or run on hard surfaces. As such, claimant has failed to prove that her work caused or contributed to this injury to any greater degree than did activities away from work. Thus, claimant has failed to prove the alleged injury "arose out of" her employment with the respondent.

In addition, Dr. Fleske opined that claimant's reaggravation of her left foot condition on February 18, 2008, was a natural and probable consequence of her injury of November 7, 2007.

Dr. Fluter thought the February 18, 2008 incident was a natural and probable consequence of the November 7, 2007 incident.

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[11] ALJ Award (Oct. 9, 2009) at 11.

[12] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

[13] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[14] *Martin*, 5 Kan. App. 2d at 300.

Based on the opinions of Dr. Fluter and Dr. Fleske, the second injury (February 18, 2008) is found to be a natural and probable consequence of the first injury (November 7, 2007).

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*,[15] the Court held:

> When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury.

The converse is also true if a second injury is the direct and natural consequence of a noncompensable injury then the second injury is not compensable. The first injury (November 7, 2007) in this instance is noncompensable due to lack of timely notice. Consequently, the injury cannot be compensable as a direct and natural consequence of the November 7, 2007 injury. And for the reasons stated above, the disability resulting from the February 18, 2008 injury is not compensable as a new and separate accident because claimant's disability is the result of the normal activities of day-to-day living.

The issues of underpayment of temporary total disability benefits and the nature and extent of disability are moot and do not require a determination by the Board.

CONCLUSION

The claimant failed to provide timely notice of the November 7, 2007 accident/injury. Claimant failed to prove that the disability resulting from the February 18, 2008 injury arose out of her employment with respondent. To the extent that claimant's February 18, 2008 injury is a natural and probable consequence of the noncompensable November 7, 2007 accident/injury, the February 18, 2008 injury is likewise noncompensable. Claimant's request for workers compensation benefits is denied.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated October 9, 2009, is affirmed.

IT IS SO ORDERED.

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[15] *Jackson v. Stevens Well Service*, 208 Kan. 637, Syl. ¶ 1, 493 P.2d 264 (1972).

Dated this _____ day of March, 2010.

_____
BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Richard L. Friedeman, Attorney for Respondent and its Insurance Fund
Bruce E. Moore, Administrative Law Judge